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International Law Situations

With Solutions and Notes

U.S. Naval War College (Editor)

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SITUATION III

AIRCRAFT—HOSPITAL SHIPS

States X and Y are at war. Other states are neutral.

(a) State X proclaims and maintains with vessels of war the surface blockade of the port of Mola on the coast of Y near the boundary of state B. Blockade proclamation states that the blockade includes aircraft. Aircraft and submarines of Y and of neutral flags pass the blockade line with ease.

(1) A private seaplane of state B becomes disabled and alights inside the blockade lines. A cruiser of X seizes the seaplane on the ground that it has violated the blockade.

(2) Would the treatment of the seaplane be the same if it had alighted 50 miles outside the blockading lines and had been met by a vessel of war of X which had no connection with the blockading forces.

(b) A military aircraft of state Y becomes disabled off the coast of state B and lands at an airport of B. State B immediately interns the aircraft and crew.

(c) At a port of R, remote from X and Y, an armed private aircraft of X calls to obtain fuel to take the aircraft directly to its port of departure in state X.

(d) An aircraft of X dropped a tear gas bomb upon a vessel of war of Y. Y declares that this act is contrary to the laws of war and that it will in retaliation use bacteriological bombs against X.

(e) A military hospital ship of X, the *Safety* flying the Red Cross flag passing within sight of but not near a fleet of Y, reports what it has seen to the commander of the fleet of X.

(1) Neutral state C learning of this action declines to allow the *Safety* any rights in its ports other than those granted to vessels of war.

(2) The fleet of Y fires upon and captures the *Safety* and takes it in to a port of Y.

What action would existing law sustain in each of the above cases?

SOLUTION

(a) 1. The private neutral seaplane alighting within the blockade lines should be seized. The proof of innocence rests upon the seaplane.

2. The private neutral seaplane alighting 50 miles outside the blockade lines is not liable to seizure unless on grounds discovered by visit and search.

(b) The military aircraft and crew should be interned by state B.

(c) The armed private aircraft of state X should not be supplied with fuel in a port of R.

(d) The use of tear gas by one belligerent against another is not prohibited, therefore the resort to the use of bacteriological bombs in retaliation is unlawful.

(e) 1. Neutral state C, while not under obligation to pass upon the character of an act of a hospital ship of a belligerent, may treat such a ship as a vessel of war if convinced that the ship has forfeited its immunities.

2. The capture of the *Safety* by the fleet of Y is lawful, but care should be taken to restrict the use of force to the minimum.

NOTES

Surface blockade.—While it must be admitted that blockade involving absolute prevention of access to the coast of the enemy has rarely, if ever, been possible, blockade involving danger to the party attempting to pass has been the rule except in paper blockades.

As was said in 1899 in the case of the *Olinde Rodrigues*:

"To be binding, the blockade must be known, and the blockading force must be present; but is there any rule determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but, on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

"The fourth maxim of the Declaration of Paris (April 16, 1856), was: 'Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.' Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force, and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances." (174 U. S. 510.)

Later in the same case it was said:

"it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

"As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law." (Ibid.)

That the nature of blockade was changing was admitted in 1899 and there have been further changes in the physical requirements since that time. Referring further to the blockaded port of San Juan, Porto Rico, where the *Olinde Rodrigues* was seized it was said,

"On July 14 and thereafter the port was blockaded by the armored cruiser New Orleans, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-pounders; four 3-pounders in the tops; four 37-millimetre automatic guns, corresponding to 1-

pounders. The range of her guns was five and one half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving, at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port." (Ibid.)

It would be difficult for a vessel which has been captured by a blockading force to maintain that the blockade was not effective.

It is further entirely conceivable that a blockade for the purpose of preventing access of bulky articles might be maintained as effective when small articles might be taken in to the port by aircraft or submarines.

Restrictions on use of aircraft, 1899, 1907.—The use of aircraft had sufficiently developed at the end of the nineteenth century to bring it before the First Hague Peace Conference of 1899 and, at this conference, the discharge of projectiles from balloons and analogous methods of warfare was prohibited for 5 years. While this period of prohibition expired during the Russo-Japanese War, both parties respected the prohibition to the end of the war.

Progress in matters of aerial navigation was so rapid that at the Second Hague Peace Conference in 1907 the states having large military forces were unwilling to renew the prohibition of 1899. There were, however, many conferences upon varying aspects of aerial navigation, and military plans recognized that the use of the air for war purposes should be anticipated.

The experience of the World War gave rise to many questions in regard to the rights of aircraft as affecting both neutrals and belligerents at sea and on land.

The matter was brought before the legal advisers at the Washington Naval Conference, 1921-22, but was referred to the Commission of Jurists appointed under a resolution of the conference.

This Commission met at The Hague and concluded its report on February 19, 1923, particularly treating of the control of radio and aircraft in time of war. The rules of this report have never been formally adopted, but are weighty evidence of what may be considered reasonable conduct under conditions covered by the rules.

Air and marine blockade.—That blockade by surface vessels may for certain purposes need the aid of aircraft to render it effective under modern conditions is evident. If, as is probable, wars of the future are to use aircraft, then the effectiveness of blockade will be measured by consideration of the factors entering into the blockade in which air as well as surface vessels are involved.

Upon this type of blockade Mr. J. M. Spaight in his discussion of the effectiveness of a blockade in the air, "assuming that neutral contiguous states would allow passage through their jurisdiction to the blockade-running aircraft," says:

"If a blockade is to be recognized as extended from the sea to the air above, it must be effective in the air as well as on the sea, but a different degree of effectiveness will probably be demanded in the air, because of the greater difficulty of controlling passage in that element. Take, for instance, the blockade of a short extent of enemy coast surrounded on each side by a neutral coast. Access to such a coast by marine craft can easily be prevented, the line to be watched being, *ex hypothesi*, short; but, for that same reason, access by aircraft would be extremely difficult to prevent, for, instead of attempting direct entry or exit, the blockade-running aircraft would always approach or leave the blockaded area through neutral jurisdiction, into which the belligerent military aircraft acting with the blockading warships could not follow them. Even where a long line of enemy coast is being blockaded, aircraft would still have an advantage in attempting entry or egress; they

would not be tied to the ports, as marine craft are, but could pass in or out anywhere, provided always that their radius of action was sufficient to enable them to reach a safe landing-ground.

"The fact that aircraft could thus find a 'way round' would not make the blockade ineffective, within the formula of the Declaration of Paris, nor entitle neutral States to claim that it should not be recognized as a legally existent blockade, the breach of which involved the condemnation of such aircraft as could in fact be captured. The fact that ships can pass (even in fairly considerable numbers, as did the blockade-runners in the American War of Secession) through the blockading cruisers is no ground for holding the blockade to be ineffective, provided that there is on the whole a real danger of capture for any individual vessel making the attempt. This principle will, no doubt, be recognized in a still greater degree in regard to aircraft, and it will be accepted as inevitable that the proportion of captures to successful evasions which would entitle neutrals to challenge the effectiveness of the blockade must be lower in their case than in that of ships." (Spaight, *Air Power and War Rights*, 2d edition, p. 397.)

(a) *Blockade; surface, submarine, and aircraft.*—The Declaration of Paris, 1856, provides that "Blockades in order to be binding must be effective." This provision was drawn for the purpose of putting an end to so-called "paper blockades." This declaration made in 1856 referred to blockades in which surface ships were the customary means of rendering the closing of the ports effective. The same principle would be generally applicable whether the proclamation was in regard to a blockade on, over, or under the sea; to be binding the blockade should be effective.

In 1899, Mr. Chief Justice Fuller, in the case of the *Olinde Rodrigues*, said, "To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render the blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question,

though a mixed one, more of fact than of law." (174 U. S. 510.) In general it has been considered that an effective blockade is one that renders access or egress from the blockaded port dangerous, and that, in a case where the craft that has attempted to pass the blockade and has been captured cannot establish that, it is not effective. The captured craft may, however, plead on other grounds that it has not violated the blockade. The burden of such proof rests upon the captured craft.

A blockade maintained by surface vessels only without means of preventing or rendering dangerous the passage of aircraft or submarine would be a "paper blockade" insofar as such craft were concerned even though proclaimed to include these.

Any seaplane met at sea by a vessel of war may be visited and searched to determine its relation to the hostilities and it may be treated according to the evidence found. In recent years on account of improved means of communication it would be difficult to prove ignorance.

Aircraft in distress.—The rules for entry of surface vessels in distress would not apply to aircraft. In the period before the World War it was thought by some that aircraft might enter and sojourn in neutral jurisdiction under the same conditions as those prescribed for surface vessels. The practice of states while neutral in the World War from the Netherlands to China was to use the force at their disposal to intern belligerent aircraft entering their jurisdiction. Dutch gunners shot down aircraft flying over Dutch territory. Other states did the same. Disabled aircraft entering neutral jurisdiction were usually detained and interned until the end of the war. *Force majeure* or distress were regarded as too indefinite to differentiate from intentional entrance in case of aircraft and the accounts of aviators of the World War seem to justify the neutral practice of prohi-

bition of entrance and internment in case of violation of the prohibition. Articles 39, 40, and 42 of the Hague Rules of 1923 show the attitude of the Commission of Jurists.

"Article 39. Belligerent aircraft are bound to respect the rights of neutral powers and to abstain within the jurisdiction of a neutral State from the commission of any act which it is the duty of that State to prevent.

"Article 40. Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State." * * *

"Article 42. A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

"A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any." (1924 Naval War College, International Law Documents, p. 131.)

Internment of British seaplanes.—In a memorandum of the British Foreign Office of May 31, 1916, the Netherlands Government was requested to permit a seaplane which had been rescued and taken in by a Dutch lugger to be dispatched to Great Britain. Certain principles were set forth in this memorandum:

"A Seaplane belonging to His Majesty's forces was recently obliged on account of engine trouble to descend while over the North Sea. The pilot was rescued by a Dutch fishing boat, which took both him and the seaplane into a Dutch port. The Netherlands Government, though they have released the pilot, appear to consider it their duty to retain the seaplane for the duration of the war. After a careful consideration of the question, His Majesty's Government feel bound to dissent from this view, and believe that the Netherlands Government are under no obligation to intern the machine.

"The Netherlands Government, in releasing the pilot, appear to have considered that he was in the same position as a member of the crew of a ship-wrecked belligerent warship who is picked up by a neutral merchant vessel and conveyed to a neutral port; such a person, under the rules of The Hague Convention No. 10, of 1907, is entitled to be released. His Majesty's Gov-

ernment believe their decision on this point to be correct and consider that, while none of the rules expressly laid down by international law exactly fit the case of the seaplane, a further examination of the principles which lie behind the rules which compel neutrals to intern belligerent forces in certain circumstances shows that the seaplane should also be released.

"The rules concerning internment are not based on any one single and uniform principle. This fact explains itself when one takes into consideration that these rules have grown up gradually and severally and were, before the Peace Conference at The Hague in 1907, customarily agreed upon from different motives. The consequence is that the rules governing internment differ not only with regard to the internment of soldiers on neutral land and internment of warships in neutral harbours, but also with regard to the internment of troops in general, and the internment of such soldiers as have escaped from captivity.

"One of the basic reasons for the rules concerning internment is no doubt the fact that a belligerent is entitled to insist that such enemy forces as have crossed neutral territory for the purpose of escaping capture, shall not be enabled to leave the neutral territory and again resort to hostilities. But this concerns only enemy forces which have deliberately entered neutral territory for the purpose of escaping capture: it cannot apply to such enemy forces as for other purposes cross into neutral territory, or even cross accidentally without knowledge of the neutral frontier. Now, all these must likewise be interned, and the basic reason for their internment is that, in case these troops are not interned, the other belligerent would be justified in crossing into the neutral territory on his part and attacking the enemy there.

"As regards the internment of men-of-war, the basic reasons are also manifold. One is—just as in the case of fugitive troops—that a belligerent is entitled to insist that enemy men-of-war which deliberately enter neutral harbours for the purpose of escaping capture, shall not after some length of time be allowed to leave and resort to hostilities again, although they may leave if they only stay twenty-four hours. Other reasons are that a neutral must not allow belligerent men-of-war to make his harbours the base of military operations, the base of supply beyond a certain limit, the base for repairing vital damages, and the like." (Parliamentary Papers, Miscellaneous, No. 4 [1918] Cd. 8985, p. 3; see also 1931 Naval War College, International Law Situations, pp. 14-22.)

The Netherlands explained that under strict rules of neutrality, the Queen's Government, to their regret, were unable to comply with the request of the British Government until the end of the war.

Later in the case of the British seaplane *No. 1232*, which came down in the North Sea, September 23, 1917, sixty miles off the Dutch coast and was rescued and towed by a Dutch fishing vessel to the Helder, the British claimed that the seaplane should be released as well as the personnel. The Dutch Government released the personnel, but declined to release the aircraft till the end of the war.

Naval War College discussion, 1926.—In referring to internment during the World War, it was said in the solution of situation III, 1926, that:

"During the World War for the first time the question of aircraft in relation to neutral jurisdiction became one of great practical importance. While practice was not, at first, in every instance uniform, gradually it came to be recognized that belligerent aircraft had no right to enter neutral jurisdiction. Some of the neutral states for a time questioned the necessity of denying entry to aircraft, and considered permitting entry on terms analogous to those applied to maritime vessels of war. Switzerland and the Netherlands, from their geographical position as neutral islands surrounded by belligerents, had to face the problem in more varied manifestations. Both states maintained the right to use necessary force to prevent entrance of belligerent aircraft or even to intern aircraft entering under *force majeure*. Disabled belligerent aircraft, aircraft trying to escape from the enemy, aircraft lost in fog or storm, were with their personnel forced to land and interned by neutral states. Early in the war there was some uncertainty in regard to hydroplanes in Norway, and later Denmark permitted some German deserters to remain after entering Danish jurisdiction in a stolen aircraft. The Netherlands interned American aircraft alighting within Dutch jurisdiction after a battle over the high sea with Germany. The Swiss authorities similarly interned American fliers when returning from an observation flight and forced by motor trouble to land within Swiss jurisdiction. There were many cases in which the crews were interned when the aircraft were destroyed either intentionally or by accident. When aircraft personnel was

rescued on the high seas and brought within neutral jurisdiction, the practice was usually to release them." (1926 Naval War College, International Law Situations, p. 100.)

(b) *Aircraft*.—The treatment of military aircraft alighting within neutral jurisdiction "for any reason whatsoever" was discussed at The Hague in the Commission of Jurists in 1923 and in meetings of other bodies since that time. The concensus of opinion has been that the duty of internment of military aircraft is even more imperative than that to intern troops entering neutral jurisdiction.

Article 53, Hague Rules, 1923.—The report of the Commission of Jurists, February 19, 1923, contained as article 53 regulations under which neutral private aircraft were liable to capture. While these rules have not been internationally adopted, they embody many accepted principles of international law.

Article 53 provides that:

"A neutral private aircraft is liable to capture if it * * *.

"(a) Resists the legitimate exercise of belligerent rights.

"(b) Violates a prohibition of which it has had notice issued by a belligerent commanding officer under article 30.

"(c) Is engaged in unneutral service.

"(d) Is armed in time of war when outside the jurisdiction of its own country.

"(e) Has no external marks or uses false marks.

"(f) Has no papers or insufficient or irregular papers.

"(g) Is manifestly out of the line between the point of departure and the point of destination indicated in its papers and after such enquiries as the belligerent may deem necessary, no good cause is shown for the deviation. The aircraft, together with its crew and passengers, if any, may be detained by the belligerent, pending such enquiries.

"(h) Carries, or itself constitutes, contraband of war.

"(i) Is engaged in breach of a blockade duly established and effectively maintained.

"(k) Has been transferred from belligerent to neutral nationality at a date and in circumstances indicating an intention of evading the consequences to which an enemy aircraft, as such, is exposed.

"Provided that in each case (except (k)) the ground for capture shall be an act carried out in the flight in which the neutral aircraft came into belligerent hands, i. e., since it left its point of departure and before it reached its point of destination." (1924 Naval War College, International Law Documents, p. 146.)

Paragraph (i) of these rules was quite fully discussed by the Commission, and their report shows the trend of the discussion.

"(i) The ninth ground for capture is that the aircraft is engaged in a breach of blockade. 'Blockade' is here used in the same sense in which it is employed in Chapter 1 of the Declaration of London, that is to say, an operation of war for the purpose of preventing by the use of warships ingress or egress of commerce to or from a defined portion of the enemy's coast. It has no reference to a blockade enforced without the use of warships, nor does it cover military investments of particular localities on land. These operations, which may be termed 'aerial blockade,' were the subject of special examination by the experts attached to the various Delegations, who framed a special report on the subject for consideration by the Full Commission. The conditions contemplated in this sub-head are those of warships enforcing a blockade at sea with aircraft acting in co-operation with them. As the primary elements of the blockade will, therefore, be maritime, the recognized principles applicable to such blockade, as for instance, that it must be effective (Declaration of Paris, article 4), and that it must be duly notified and its precise limits fixed, will also apply. This is intended to be shown by the use of the words 'breach of blockade duly established and effectively maintained' in the text of the sub-head.

"It is too early yet to indicate with precision the extent to which the co-operation of aircraft in the maintenance of blockade at sea may be possible; experience alone can show. Nevertheless, it is necessary to indicate the sense in which the Commission has used the word 'effective.' As pointed out in the Declaration of London, the effectiveness of a blockade is a question of fact. The word 'effective' is intended to ensure that it must be maintained by a force sufficient really to prevent access to the enemy coast-line. The prize court may, for instance, have to consider what proportion of surface vessels can escape the watchfulness of the blockading squadrons without endangering the effectiveness of the blockade; this is a question which the

prize court alone can determine. In the same way, this question may have to be considered where aircraft are co-operating in the maintenance of a blockade.

"The invention of the aircraft cannot impose upon a belligerent who desires to institute a blockade the obligation to employ aircraft in cooperation with his naval forces. If he does not do so, the effectiveness of the blockade would not be affected by failure to stop aircraft passing through. It is only where the belligerent endeavors to render his blockade effective in the air-space above the sea as well as on the surface itself that captures of aircraft will be made and that any question of the effectiveness of the blockade in the air could arise.

"The facility with which an aircraft, desirous of entering the blockaded area, could evade the blockade by passing outside the geographical limits of the blockade has not escaped the attention of the Commission. This practical question may affect the extent to which belligerents will resort to blockade in future, but it does not affect the fact that where a blockade has been established and an aircraft attempts to pass through into the blockaded area within the limits of the blockade, it should be liable to capture.

"The Netherlands Delegation proposed to suppress (i) on the grounds that air blockade could not be effectively maintained, basing its opinion on its interpretation of the experts' report on the subject.

"The British, French, Italian and Japanese Delegations voted for its maintenance. The American Delegation voted for its maintenance *ad referendum*." (Ibid., p. 144.)

Armed private aircraft.—The Hague Commission of 1923 also gave consideration to the arming of private aircraft and expressed the opinion that the interests of all would be better served if the arming of private aircraft should be prohibited. Since 1923 this opinion has been repeatedly confirmed because giving rise to many possible misunderstandings and there has been introduced the general understanding that public aircraft only may be armed.

(c) *Military aircraft in neutral jurisdiction.*—While there is still doubt in regard to the obligations of a neutral state in respect to private aircraft of a belligerent nationality, the rules of the Hague Commis-

sion of Jurists of 1923 are generally considered as binding as to public and military aircraft. These rules of the Hague Commission were based on a draft submitted by the American delegation.

The report of the Commission in commenting on this article says,

"The provision in the article is limited to military aircraft because it is only in respect of such craft that the prohibition on entry is absolute. Under article 12 the admission of private or public non-military aircraft is within the discretion of the neutral State. Where such aircraft penetrate within neutral jurisdiction in violation of the measures prescribed by the neutral Power, they will be subject to such penalties as the neutral Power may enact; these may or may not include internment. Recognition of this fact has enabled the Commission to omit a provision which figured as article 11 in the American draft:

'A neutral Government may intern any aircraft of belligerent nationality not conforming to its regulations.'

"The obligation on the part of the neutral Power to intern covers not only the aircraft, but its equipment and contents. The obligation is not affected by the circumstance which led to the military aircraft coming within the jurisdiction. It applies whether the belligerent aircraft entered neutral jurisdiction, voluntarily or involuntarily, and whatever the cause. It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent.

"The only exceptions to the obligation to intern an aircraft are those arising under articles 17 and 41. The first relates to flying ambulances. Under the second, an aircraft on board a warship is deemed to be part of her, and therefore will follow the fate of that warship if she enters neutral ports or waters. If she enters under circumstances which render her immune from internment, such aircraft will likewise escape internment.

"The obligation to intern belligerent military aircraft entering neutral jurisdiction entails also the obligation to intern the personnel. These will in general be combatant members of the belligerent fighting forces, but experience has already shown that in time of war military aeroplanes are employed for transporting passengers. As it may safely be assumed that in time of war a passenger would not be carried on a belligerent military aircraft unless his journey was a matter of importance to

the Government, it seems reasonable also to comprise such passengers in the category of persons to be interned." (Ibid, p. 133.)

Retaliation.—Particularly during and since the World War the idea of retaliation has received renewed attention. Retaliation was before 1914 regarded as in the realm of acts not in accord with international law which might be resorted to against an opponent who in war disregarded the law of war. Retaliatory measures were to be strictly limited to remedying the breach of the law by the enemy and to be directed toward the enemy though a neutral might be inconvenienced or even incidentally injured, but the act of retaliation should not be aimed at the neutral or directly restrict the rights of a neutral. It was admitted that the law of contraband, blockade, and unneutral service did limit the peacetime rights of a neutral state, but these restrictions were generally accepted.

Retaliation has usually been threatened or resorted to when new methods or means of war have come into use. Threats were made in the Franco-Prussian War, 1870, that balloons would be treated as spies, and in the Russo-Japanese War, 1904-5, that newspaper correspondents using radio would be treated as spies. During the World War there were many propositions to the effect that aviators, if captured, should be hanged or immediately shot, or in any case, should be treated as criminals. Similar propositions were advanced in regard to the personnel of submarines regardless of their conduct.

In the time of war there is always a ready response to rumors of unlawful conduct on the part of an opponent. Propaganda and war hysteria serve to make demands for retaliation or for reprisals popular and to make pictures of enemy disregard of law readily accepted.

While there have been attempts to regulate in some degree reprisals on land by international conventions,

such conventions have not been formally extended to maritime and aerial warfare. It would, however, be safe to assume that in principle the same law would apply over, on, and in the sea.

The late Prof. A. Pearce Higgins, who aided in preparing some of the arguments for the British Government in prize cases, after the cases of the *Zamora*, *Leonara*, and *Stigstad*, proposed the following bases for consideration:

"1. Retaliation is a right of the belligerent which must be exercised only after the greatest provocation, and as a last resort.

"2. Retaliatory measures must primarily be directed only against the enemy and need not be of an identical character with the wrong complained of.

"3. In the exercise of retaliation the fundamental laws of humanity must be observed.

"4. In all cases of retaliation which involve inconvenience or detriment to neutrals, Prize Courts of the belligerents should have jurisdiction both to enquire into the facts alleged as giving rise to the retaliatory measures, and also to decide whether the means adopted inflict on neutrals a degree of inconvenience in excess of that necessary to terminate the alleged illegalities.

"5. Neutrals should be allowed compensation in all cases where there is undue delay in dealing with their cases in the belligerent Prize Courts under retaliatory orders, or where ship or cargo is released in consequence of an erroneous application of the order.

"6. Retaliatory orders, since they are in derogation of the general rules of law, must, in case of ambiguity of language, be construed against the states issuing them." (Pearce Higgins, *International Law and Relations*, p. 237.)

Protocol on gases, 1925.—At the Washington Conference on the Limitation of Armament, 1921–22, the proposal to limit the use of gas was coupled with regulations in the use of submarines. The Advisory Board of the American delegation submitted a report from its subcommittee on new agencies of warfare which contained the following:

"Resolved, That chemical warfare, including the use of gases, whether toxic or nontoxic, should be prohibited by international

agreement, and should be classed with such unfair methods of warfare as poisoning wells, introducing germs of disease, and other methods that are abhorrent in modern warfare." (Conference on the Limitation of Armament, Washington, November 12, 1921–February 6, 1922, p. 732.)

The French version of this resolution was as follows:

"Il est décidé: Que la guerre chimique, comprenant l'usage des gaz, toxiques ou non toxiques, devrait être interdite par un accord international, et classée parmi les méthodes de guerre déloyales, telles que l'empoisonnement des puits, la propagation de germes de maladies et autres méthodes exécrables de la guerre moderne." (Ibid, p. 733.)

It will be observed that the form in both languages is "toxic or nontoxic." The chairman of the conference, Mr. Secretary Hughes, also called attention to a report of the General Board of the United States Navy in which, referring to the question "Should gas warfare be prohibited," it was stated:

"4. The two principles in warfare, (1) that unnecessary suffering in the destruction of combatants should be avoided, (2) that innocent noncombatants should not be destroyed, have been accepted by the civilized world for more than one hundred years. The use of gases in warfare in so far as they violate these two principles is almost universally condemned to-day, despite its practice for a certain period during the world war.

"5. Certain gases, for example, tear gas, could be used without violating the two principles above cited. Other gases will, no doubt, be invented which could be so employed; but there will be great difficulty in a clear and definite demarcation between the lethal gases and those which produce unnecessary suffering as distinguished from those gases which simply disable temporarily. Among the gases existing to-day there is undoubtedly a difference of opinion as to the class to which certain gases belong. Moreover, the diffusion of all these gases is practically beyond control and many innocent non-combatants would share in the suffering of the war, even if the result did not produce death or a permanent disability.

"6. The General Board foresees great difficulty in clearly limiting gases so as to avoid unnecessary suffering in gas warfare and in enforcing rules which will avert suffering or the possible destruction of innocent lives of noncombatants, including women

and children. Gas warfare threatens to become so efficient as to endanger the very existence of civilization.

"7. The General Board believes it to be sound policy to prohibit gas warfare in every form and against every objective, and so recommends." (Ibid, p. 734.)

Reference in the discussion was made to article 171 of the Treaty of Versailles, June 28, 1919, which as applying to gas in the English and French is:

"The use of asphyxiating, poisonous or other gases and all the analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany."

"The same applies to materials specially intended for the manufacture, storage and use of the said products or devices." (Ibid, p. 738.)

"L'emploi des gaz asphyxiants, toxiques ou similaires, ainsi que de tous liquides, matières ou procédés analogues, étant prohibé la fabrication et l'importation en sont rigoureusement interdites en Allemagne.

"Il en est de même du matériel spécialement destiné à la fabrication, à la conservation ou à l'usage desdits produits ou procédés." (Ibid, p. 739.)

A convention embodying this principle was drawn up at the Washington Conference, but did not become effective because not ratified by all the powers.

In 1925, however, a protocol relating to gas only was opened for signature at Geneva, and a large number of ratifications or adhesions have been deposited. The parts of this protocol referring particularly to the conduct of war are in English and French as follows:

"Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and

"Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

"To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

DECLARE:

"That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this

prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration." (94 League of Nations Treaty Series, p. 65.)

"Considérant que l'emploi à la guerre de gaz asphyxiants, toxiques ou similaires, ainsi que de tous liquides, matières ou procédés analogues, a été à juste titre condamné par l'opinion générale du monde civilisé;

"Considérant que l'interdiction de cet emploi a été formulée dans des traités auxquels sont Parties la plupart des Puissances du monde;

"Dans le dessein de faire universellement reconnaître comme incorporée au droit international cette interdiction, qui s'impose également à la conscience et à la pratique des nations,

"DÉCLARENT :

"Que les Hautes Parties contractantes, en tant qu'elles ne sont pas déjà parties à des traités prohibant cet emploi, reconnaissent cette interdiction, acceptent d'étendre cette interdiction d'emploi aux moyens de guerre bactériologiques et conviennent de se considérer comme liées entre elles aux termes de cette déclaration." (Ibid, p. 65.)

It would seem that the prohibition in English in the words "asphyxiating, poisonous, or other gases" is not identical with the French "gaz asphyxiants, toxiques ou similaires." The English would seem to be a general prohibition of the use of gas while the French would prohibit gases of specific types. Both would prohibit bacteriological warfare.

It could scarcely be asserted even in 1925 that the use of all kinds of gases "had been condemned by the general opinion of the civilized world." Indeed smoke screens and similar methods were then and are now approved. It may be difficult to make a legal distinction between smoke in the eyes of an enemy and a gas that may cause tears, while neither may cause suffering which the protocol aims to prohibit and which "has been justly condemned by the general opinion of the civilized world."

Treaty of Versailles, article 171.—The treaty of Versailles though signed by a large number of states was

not ratified by all the signatories, and some of its provisions have for various reasons become inoperative.

Article 171 in the French and English versions of the Treaty of Versailles is as follows:

“ARTICLE 171.”

“L'emploi des gaz asphyxiants, toxiques ou similaires, ainsi que de tous liquides, matières ou procédés analogues, étant prohibé, la fabrication et l'importation en sont rigoureusement interdites en Allemagne.

“Il en est de même du matériel spécialement destiné à la fabrication, à la conservation ou à l'usage desdits produits ou procédés.

“Sont également prohibées la fabrication et l'importation en Allemagne des chars blindés, tanks ou de tout autre engin similaire pouvant servir à des buts de guerre.”

“ARTICLE 171.”

“The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.

“The same applies to materials specially intended for the manufacture, storage and use of the said products or devices.

“The manufacture and the importation into Germany of armoured cars, tanks and all similar constructions suitable for use in war are also prohibited.”

While the accuracy of the translation of the article may be open to question, the English form does not seem to conform to international law because there are some gases other than asphyxiating and poisonous, the use of which is not prohibited in war. If a gas causes unnecessary suffering, its use would be considered contrary to international law. The use of a tear gas bomb might be preferred to a projectile that would result in asphyxiating the personnel of the vessel of war by drowning, and tear gas has not yet been included in the list of prohibited gases.

Bombardment from aircraft.—Regulations in regard to the discharge of projectiles from aircraft have been made. None are now generally accepted unless it be

admitted that an amendment in Laws and Customs of War on Land of 1907 by which it was thought by some the prohibition of undefended towns was extended to operations of aircraft. The 1899 convention had prohibited bombardment of undefended "towns, villages, habitations, or buildings." The 1907 inserted the words "by any means whatever." This would not in any case apply to dropping bombs on a vessel of war.

The proposed Hague rules of 1923 in regard to aerial warfare in article 24 provide:

"1. Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

"2. Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

"3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

"4. In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

"5. A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article." (1924 Naval War College, International Law Documents, p. 120.)

Attention on this article was particularly fixed upon land warfare and the report of the Commission of Jurists explains the article as follows:

"Agreement on the following article specifying the objects which may legitimately be bombarded from the air was not

reached without prolonged discussion. Numerous proposals were put forward by the various delegations before unanimity was ultimately attained. The text of these proposals will be found in the minutes. In particular, mention may be made of an Italian proposal of the 8th February, on which the text ultimately adopted was in great part founded. Regret was expressed by some delegations that a more far-reaching prohibition did not meet with unanimous acceptance.

"The terms of the article are so clear that no explanation of the provisions is necessary, but it may be well to state that in the phrase in paragraph 2 'military establishments or depots' the word 'depots' is intended to cover all collections of supplies for military use which have passed into the possession of the military authorities and are ready for delivery to the forces, 'distinctively military supplies' in the succeeding phrase is intended to cover those which by their nature show that they are certainly manufactured for military purposes.

"If the code of rules of aerial warfare should eventually be annexed to a convention, paragraph 5 of the article would find a more appropriate place in the convention.

"It will be noticed that for aerial bombardment the test adopted in article 25 of the Land Warfare Regulations, that of the town, &c., being defended, is abandoned. The nature of the objective or the use to which it is being put now becomes the test." (Ibid.)

There would be no question that a vessel of war would be and has been regarded as a military objective.

Proposals before the conference for the reduction and limitation of armaments, 1932.—Numerous proposals were presented to the conference commonly referred to as the "Disarmament Conference."

On February 5, 1932, the French delegation in the preamble to certain proposals stated:

"The Government of the Republic, conscious of the gravity of the problem to be solved, is convinced that, in accordance with previous work of the League of Nations, the Conference should deal with this problem as a part of general policy.

"This is all the more important since it meets at a time of economic and moral tension, at a time of general disturbance and uneasiness, when events emphasize the absolute necessity of a better organisation in a tormented world.

"The Government of the Republic is anxious to honor the promise contained in its memorandum of July 15th, 1931, and to reply to the repeated appeals made by the League of Nations, notably in the resolution of the Assembly of 1927. It intends thus to fulfil a double duty.

"It assumes that, on the basis of the draft Convention of 1930, action will be taken with the least possible delay.

"Further, it presents herewith proposals for placing civil aviation and bombing aircraft, and also certain material of land and naval forces, at the disposal of the League of Nations; for the creation of a preventive and punitive international force; for the political conditions upon which such measures depend; and, lastly, for new rules providing for the protection of civil population." (League of Nations Publications, Conf. D. 56, 1931. IX. p. 1.)

The French Government proposed that civil aviation and bombing aircraft be placed at the disposal of the League of Nations. In the detailed provisions of the French proposals, it was stated:

"In addition to the preceding provisions, the Government of the Republic proposed the adoption of the following rules which can be adopted unconditionally:

"(a) The use by aeroplanes and by land or naval artillery of projectiles which are specifically incendiary or which contain poison gases or bacteria is forbidden, whatever the objective." (Ibid., p. 3.)

The German delegation also submitted certain positive proposals on February 18, 1932:

"17. The maintenance of air forces of any kind is forbidden. The total air force material which has so far been either in service or in reserve or on stock shall be destroyed, except those armaments which are to be incorporated in the quantities allowed for land and naval forces.

"18. The dropping of bombs or any other objects or materials serving military purposes from aircraft, as well as all preparations to this effect shall be forbidden without any exception.

"19. With a view to strictly enforcing the prohibition of any military aviation, the following shall, *inter alia*, be forbidden.

"(a) Any instruction and training of any person in aviation having a military character or a military purpose." (Ibid., Conf. D. 79. IX. 1932, p. 3.)

The Soviet delegation made the most comprehensive proposal to the effect that the real organization for peace and security would be through "the general complete and rapid abolition of all armed forces."

The Italian delegation proposed the abolition of both aircraft carriers and bombing aircraft.

Other states proposed the prohibition of military aviation and of the use of bombs from aircraft.

Even the American delegation on February 18, 1932, indicated that the Government would "join in formulating the most effective measures to protect civilian populations against aerial bombing."

The Japanese delegation made a similar proposition and would also prohibit aircraft-landing platforms and aircraft carriers.

(d) *Use of gas.*—As military aircraft only are entitled to exercise belligerent rights, the rights thus exercised should be limited to those of lawful warfare. The use of poisonous gases and those that cause unnecessary suffering is in general prohibited. The use of smoke screens and of tear gas has not been included in the category of prohibited acts, but the use of bacteriological warfare has been prohibited.

Hospital ships in World War.—There were many charges and counter-charges in regard to the misuse of hospital ships during the World War. The French Government even announced that its hospital ships would carry a certain number of German officers who had been made prisoners of war, and in retaliation the German Government announced that it would expose French officers in the war zone on land. In the Mediterranean the controversy was adjusted by an agreement in September 1917 that a Spanish officer should accompany the hospital ship in order to see that the Hague convention should be observed. The experience of the World War showed that in spite of revisions, the Geneva convention should have still further revision to

meet new and changing conditions of warfare. Such questions arise as: What should be the degree of sickness entitling a military man to travel upon a hospital ship; how far may hospital ships evacuate crowded hospitals on land; might a transport ship on an outward voyage to the seat of war act as a hospital ship carrying sick and wounded on its return?

In general the tendency during the World War was to interpret convention X strictly and to confine the action of the ships to "assisting the wounded, sick, and shipwrecked", and not including those wounded or sick on land by evacuating land hospitals.

The "Orel", 1904.—The *Orel* (*Aryol*), a steamer belonging to the Russian volunteer fleet, was chartered at the outbreak of the Russo-Japanese War as a hospital ship to serve the Russian Red Cross. Japan was notified, and assented to this action.

En route to the Far East, the *Orel* on one occasion conveyed instructions from the commander in chief to one of the ships of the squadron. She was also instructed to purchase insulated wire in Cape Town. After arrival in Far Eastern waters, she took on board the uninjured captain and three members of the crew of ship which had been destroyed by a vessel of war of the Russian fleet. In approaching the Straits of Tsushima, the *Orel* was in the position of a fleet reconnaissance vessel, and was stopped and taken to the Japanese prize court.

The conclusion of the Court is as follows:

"A hospital ship is only exempt from capture if she fulfils certain conditions and is engaged solely in the humane work of aiding the sick and wounded. That she is liable to capture, should she be used by the enemy for military purposes, is admitted by International Law, and is clearly laid down by the stipulations of The Hague Convention No. 3 of July 29th, 1899, for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22nd, 1864. Although the "Orel" had been lawfully equipped and due notification concerning her

had been given by the Russian Government to the Japanese Government, yet her action in communicating the orders of the Commander-in-Chief of the Russian Second Pacific Squadron to other vessels during her eastward voyage with the squadron, and her attempt to carry persons in good health, *i. e.*, the master and three other members of the crew of a British steamship captured by the Russian fleet, to Vladivostock, which is a naval port in enemy territory, were evidently acts in aid of the military operations of the enemy. Further, when the facts that she was instructed by the Russian squadron to purchase munitions of war, and that she occupied the position usually assigned to a ship engaged in reconnaissance, are taken in consideration, it is reasonable to assume that she was constantly employed for military purposes on behalf of the Russian squadron. She is, therefore, not entitled to the exemptions laid down in The Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention, and may be condemned according to International Law." (2 Hurst and Bray, *Russia and Japanese Prize Cases*, p. 354.)

The "Ophelia", 1914.—The *Ophelia* was a German auxiliary military hospital ship, met in the North Sea October 18, 1914, and taken on suspicion to a British port where she was detained as prize. The *Ophelia* was condemned as prize on May 21, 1915, on the ground that "she was adapted and used as a signaling ship for military purposes." The case was appealed to the Judicial Committee of the Privy Council where a decision was rendered May 8, 1916.

Particular reference was made to articles 1 and 8 of Hague Convention 10 of 1907.

"ART. 1. Military hospital ships, that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers, shall be respected and cannot be captured.

"ART. 8. The protection to which hospital ships are entitled ceases if they are used to commit acts harmful to the enemy. The presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection."

It was stated in this case that the only question in the nature of a point of law was as to the presence of a

wireless telegraphy apparatus. The formalities constituting the *Ophelia* a hospital ship had been met.

Question arose as to whether the *Ophelia* was "wholly and solely" fitted as a hospital ship.

The opinion of Commander Newman was stated:

"In the opinion of Commander Newman, who had special experience in the fitting of hospital ships, the *Ophelia* was not only unsuitable for use as a hospital ship, but was undoubtedly fitted and intended for signalling purposes. He came to that conclusion without knowing that the ship was suspected of acting as a signalling ship, and when he had merely been instructed to report on her suitability as a hospital ship." ([1916] 2 A. C. 206.)

The opinion in the judgment remarked that—

"It is obvious that there could hardly be a greater or more dangerous abuse of the privileges of a hospital ship than the communicating to the naval authorities of her nation information which she would be constantly in a position to obtain by virtue of her immunity. Her signalling apparatus ought to be confined strictly to what would be necessary for receiving instruction as to her duties and for calling for assistance in the performance of them and such like legitimate purposes. That the risk of such abuse was present to the minds of the framers of the Hague Convention is shown by the mention of wireless telegraphy. Instead of the signalling apparatus and equipment of the *Ophelia* being confined within the narrow limits necessary for a *bona fide* hospital ship, it was obviously very largely in excess of them. * * * It is, however, the enormous number of Very's signal lights which were on board which seemed to the President, and seems also to the Board, practically conclusive that the vessel was specially equipped for signalling. These lights are fired from a special kind of pistol, of which there were two on board. Of these Very's lights she had on board no less than 600 green, 480 red, and 140 white lights, obviously a most abnormal number. It is said by Commander Newman that a British vessel of the same class would have about 12 of each. At the trial it was discovered for the first time that a record of the number of these lights which had been used, had been kept, but that it was destroyed by the paymaster by the order of Captain Pfeiffer after the capture, and on the evening of the day when they had been informed that the vessel was to be put in the Prize Court. * * *

"On these facts the learned President found that the *Ophelia* was not adapted or equipped *solely* as a hospital ship, and with that finding their Lordships agree. This finding would in itself justify the condemnation, but the matter ought not to be left to rest there, and the use actually made of the vessel must now be considered." (Ibid.)

The testimony as to the use of the *Ophelia* for hospital work is conflicting, and her movements were regarded as suspicious, and apparently some ship's papers were destroyed. The appeal supported the opinion of the lower court that—

"the *Ophelia* was not constructed, adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and used as a signalling ship for military purposes." (Ibid.)

Controversy on use of hospital ships, 1917.—On January 28, 1917, the German foreign office requested the American Embassy at Berlin to transmit to the British Government a memorandum respecting the misuse of hospital ships. In this memorandum the first paragraph states:

"For some time the enemy Governments, especially the British Government, have used their hospital ships not only for the purpose of rendering assistance to the wounded, sick, and shipwrecked, but also for military purposes, and have thereby violated the Hague Convention regarding the application of the Geneva Convention to maritime warfare." (Parliamentary Papers, Miscellaneous, No. 16 [1917] Cd. 8692, p. 3.)

There follow specifications of accusations which the German Government claim have most seriously violated the Hague convention regarding the application of the Geneva convention to maritime warfare, and then the memorandum concludes:

"In view of the breach of treaty committed by their enemies the German Government would be entitled to free themselves altogether from the obligations contained in the Convention; for reasons of humanity, however, they desire still to refrain from doing so. On the other hand, they can no longer permit the British Government to despatch their troop and munition

transports to the principal theatre of war under the hypocritical cloak of the Red Cross. They therefore declare that from this moment on they will no longer suffer any enemy hospital ship in the maritime zone which is situated between the lines Flamborough Head to Terschelling on the one hand and Ushant to Lands End on the other. Should enemy hospital ships be encountered in this maritime zone, after an appropriate lapse of time, they will be considered as belligerent and will be attacked without further consideration. The German Government believe themselves all the more justified in adopting these measures as the route from Western and Southern France to the West of England still remains open for enemy hospital ships, and the transport of English wounded to their homes can consequently be effected now as heretofore without hinderance." (Ibid., p. 4.)

To the charges made by the German Government, the British Government replied that the German vessels of war had neglected the remedy which was legally available to them in case of suspicion. This was to visit and inspect the hospital ship in order to determine whether the suspicion was well founded. After a general denial of the German charges, each is specifically discussed and reasons given for the statement that British hospital ships had conformed to the requirements of the Hague convention.

International Red Cross, 1917.—The German action in regard to hospital ships led the International Red Cross Committee to address a protest to the German Government which was later given to the press.

"Genève, 14 avril 1917.

"Le 29 janvier 1917, le gouvernement allemand a rendu une ordonnance par laquelle, à partir de ce jour, tous les navires-hôpitaux portant les marques de la Croix-Rouge seraient considérés comme vaisseaux de guerre, attaqués et coulés comme tels, dans une zone déterminée de la Manche et de la mer du Nord.

"Le gouvernement allemand donne comme motif de cette mesure rigoureuse le fait que le gouvernement anglais se servirait habituellement de ses navires-hôpitaux pour le transport de troupes et de munitions, protégées ainsi par le drapeau de la Croix-Rouge. Le gouvernement allemand puise dans cette

accusation le droit de se délier vis-à-vis des navires-hôpitaux du respect que les conventions de Genève et de la Haye imposent à leur égard.

“Le 20 mars 1917, un sous-marin allemand torpillait l'*Asturias*, un vaisseau dont l'apparence ne laissait aucun doute sur sa destination, et qui la veille avait déposé un grand nombre de blessés et de malades. Précédemment déjà, un autre grand vaisseau-hôpital, le *Britannic*, avait eu le même sort.

“Le Comité international, qui a le droit et le devoir de faire respecter les principes de la Croix-Rouge et de la convention de Genève, en signalant les atteintes que pourraient y être portées, attire la très sérieuse attention du gouvernement impérial sur la responsabilité qu'il assumerait vis-à-vis du monde civilisé en persistant dans une résolution en contradiction avec les conventions humanitaires qu'il s'est solennellement engagé à respecter.

“En torpillant des navires-hôpitaux, on s'attaque non à des combattants, mais à des êtres sans défense à des blessés mutilés ou brisés par la mitraille, à des femmes que se dévouent à une oeuvre de secours et de charité, à des hommes qui ont pour armes non celles qui servent à ôter la vie à l'adversaire, mais celles au contraire qui peuvent la lui conserver et apporter quelque soulagement à ses souffrances.

“Tout navire-hôpital muni des signes extérieurs prévus par les conventions internationales et dont mise en service a été régulièrement notifiée aux belligérants, est au bénéfice d'une présomption légale et doit être respecté par les belligérants.

“Ceux-ci, s'ils ont de justes motifs de craindre qu'un navire-hôpital soit partiellement affecté à des buts militaires, ont sur lui, en vertu de l'article 4 de la convention de la Haye, le droit de contrôle et de visite: ils peuvent lui imposer une direction déterminée et mettre à bord un Commissaire, même le détenir, si la gravité des circonstances l'exige. Ils n'ont en aucun cas le droit de le couler et d'exposer à la mort tout le personnel hospitalier et les blessés transportés par ce navire.

“L'*Asturias* paraît avoir été torpillé sans qu'on se soit préoccupé ni de son caractère, ni de sa destination.

“Même si l'on admettait l'exactitude des faits sur lesquels l'Allemagne s'appuie pour justifier son ordonnance, le Comité international estime que rien ne saurait excuser le torpillage d'un navire-hôpital.

“C'est pourquoi, considérant l'ordonnance du 29 janvier comme étant en désaccord avec les conventions internationales, il ex-

prime le voeu que cette ordonnance ne soit plus appliquée à l'avenir.

"Au nom du Comité international de la Croix-Rouge:

"Le Président,

"G. ADOR.

"Les vice-Présidents,

"Prof. Ad. d'ESPINE,

"EDOUARD NAVILLE."

(Revue de Droit International Public, vol. 24 (1917), no. 6, p. 471.)

(e) *Hospital ships*.—Hospital ships are not to be used "for any military purpose." As long as the hospital ships conform to the provisions of the Geneva convention they are not to be captured and are granted in neutral ports exemption from the usual restrictions applying to vessels of war. These exemptions are granted on the ground of the humanitarian occupation to which the hospital ship is devoted and the exemption ceases when other use is made of the vessel. At such time each state must, considering the circumstances, determine its attitude toward and treatment of the ship. The neutral state must fulfil its obligations and the belligerent state may exercise its rights.

As the hospital ship is supposed to be an unarmed vessel with a nonbelligerent personnel and incapacitated or shipwrecked persons on board and as by the Geneva convention belligerents have the right to "control and visit" hospital ships or even to detain them, there would seem to be no ground for firing upon such a ship unless to bring it to if it was attempting to escape.

SOLUTION

(a) 1. The private neutral seaplane alighting within the blockade lines should be seized. The proof of innocence rests upon the seaplane.

2. The private neutral seaplane alighting 50 miles outside the blockade lines is not liable to seizure unless on grounds discovered by visit and search.

(b) The military aircraft and crew should be interned by state B.

(c) The armed private aircraft of state X should not be supplied with fuel in a port of R.

(d) The use of tear gas by one belligerent against another is not prohibited, therefore the resort to the use of bacteriological bombs in retaliation is unlawful.

(e). 1. Neutral state C, while not under obligation to pass upon the character of an act of a hospital ship of a belligerent, may treat such a ship as a vessel of war if convinced that the ship has forfeited its immunities.

2. The capture of the *Safety* by the fleet of Y is lawful, but care should be taken to restrict the use of force to the minimum.